

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County
R. Knox McMahon, Trial Judge
George M. McFaddin, Jr., PCR Judge

Case No. 2017-CP-40-7564

ANTHONY M. PORTERFIELD, 310529,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

NOTICE OF APPEAL

Petitioner the State of South Carolina appeals the Order of the Honorable George M. McFaddin, Jr., filed August 17, 2017, granting Respondent post-conviction relief, and the Order Denying Petitioner's Motion to Alter or Amend pursuant to Rule 59(e), SCRCPP, dated September 26, 2022. Petitioner received written notice of the entry of the Order denying its Motion to Alter or Amend on September 29, 2022.

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Anthony Porterfield, 310529,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

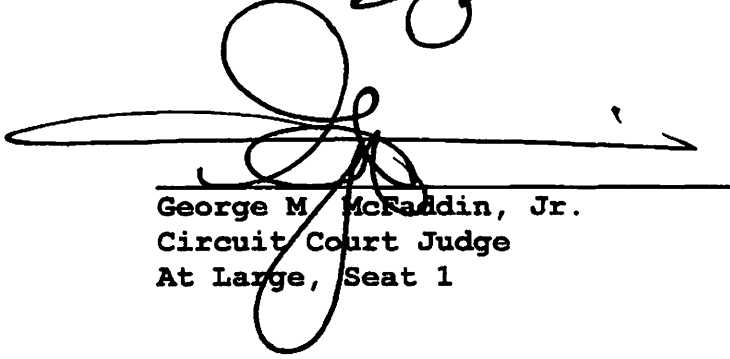
CASE NO.: 2017-CP-40-7564

ORDER ON RESPONDENT'S MOTION
TO RECONSIDER

RICHLAND COUNTY
FILED
2022 SEP 26 AM 10:48

I have considered Respondent's Motion for Reconsideration of PCR recorded September 1, 2022, and I respectfully decline to alter, amend, or vacate the Court's previous ruling.

AND IT IS SO ORDERED this 17th day of September 2022.


George M. McFaddin, Jr.
Circuit Court Judge
At Large, Seat 1

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
)
 Anthony M. Porterfield, #310529,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

2017-CP-40-7564

**ORDER GRANTING
 POST-CONVICTION RELIEF**

2022 AUG 17 AM 11:27
 RICHLAND COUNTY
 FILED
 CLERK OF COURT
 COURT HOUSE
 COLUMBIA, S.C.

This matter is before this Court by way of an application for post-conviction relief (PCR) filed by Anthony M. Porterfield (Applicant) on December 14, 2017. The State made its return on May 31, 2018. An evidentiary hearing was held at the Richland County Courthouse on May 24-26, 2022. Applicant was present and represented by Lir Patrick Derieg, Esquire. Assistant Attorney General Scott Matthews represented the State.

This Court heard testimony from Applicant; Diana Addison; Anastasia Walker, Esquire; and Robert Bank, Esquire. This Court had before it the Amended Application filed May 24, 2022, the State's Return, Applicant's records from the South Carolina Department of Corrections, the Clerk of Court's records regarding the subject convictions, and the transcript of Applicant's trial. After consideration, this Court finds Applicant has proved he is entitled to post-conviction relief on allegations one and five of the Amended Application. Thus, this Court vacates his convictions and orders a new trial.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a thirty-year sentence. In October 2012, the Richland County Grand Jury indicted Applicant for two counts of kidnapping (2012-GS-40-5294, 2012-GS-40-5297), one count of first-degree

burglary (2012-GS-40-5295), and one count of armed robbery (2012-GS-40-5296). These charges arose following a home invasion and robbery of Gulzar Nathani's home-business.

On February 23, 2015, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. Anastasia Walker, Esquire and Robert Bank, Esquire represented Applicant. Assistant Solicitors Luck Campbell and Meghan Walker of the Fifth Circuit Solicitor's Office prosecuted the case. On February 27, 2015, the jury found Applicant guilty as indicted. Judge McMahon sentenced him to concurrent terms of thirty years' imprisonment for each offense.

Applicant appealed. The South Carolina Court of Appeals dismissed Applicant's appeal following a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Porterfield, Op. No. 2017-UP-141 (S.C. Ct. App 2017). The remittitur was sent on April 21, 2017.

FACTS PRESENTED AT TRIAL

At trial, Gulzar Nathani's daughters (Child 1 and Child 2)¹ testified they were returning home from lunch at approximately 2:00 p.m. on June 27, 2012, when they noticed two black men and a vehicle in their driveway. Child 1 recognized one of the men as Applicant, whom she knew as "Amp." (R. 194). The other man was wearing a mask. After Applicant asked to speak to Nathani, Child 1 and Child 2 went inside to look for their phone. When Child 2 went upstairs, Applicant pulled a handgun out of a black laptop bag and forced his way inside. (R. 195-96). Applicant then forced the two children to the ground while he and the other man took various electronic items. After the men left, the children called 911. When police arrived, Child 1 and Child 2 identified Applicant by his nickname "Amp." Each also identified him from a six-person photo lineup. At trial, they identified Applicant as one of the assailants.

Applicant testified in his own defense. Additionally, he called five alibi witnesses to

¹ This Court is redacting their names to protect their privacy. For reference, the older daughter is identified as Child 1.

attempt to establish he was working at the time of the robbery. One of Applicant's witnesses, Aaron Griffin, provided Applicant's timecard from the day of the robbery, which purported to show Applicant was at work at 2:00 p.m. on the day of the home invasion. Applicant also called Dr. Dawn McQuiston, an expert who testified regarding cross-racial misidentifications in eyewitness testimony. At the conclusion of trial, Applicant was convicted of all charges.

ISSUES BEFORE THIS COURT

At the PCR hearing, Applicant proceeded on the sixteen allegations in his Amended Application. Specifically, he alleged trial counsel was ineffective in the following regards:

1. Failure to adequately cross victims and their father regarding prior inconsistent statements / not calling witnesses regarding prior inconsistent statements.
2. Failure to object to Burg 1st indictment.
3. Failure to object to the foundation for jail calls.
4. How State obtained Diana Addison's number.
5. Laptop bag issue.
6. Failure to address 4th Amend violations regarding Defendant's capture.
7. Missing witness rule.
8. Failure to object to Defendant having to wear shackles and restraints.
9. Accomplice Liability.
10. Failure to review discovery with defendant before trial.
11. Failure to prepare defendant for testimony.
12. Refusing to ask victims' father and Defendant about their prior relationship.
13. Failure to properly investigate.
14. No objection to use of victims' or Defendant's cell phone records due to lack of foundation.
15. Failure to adequately prepare Defendant's witnesses.
16. Failure to call expert witness to explain cell tower logs of Defendant's phone / no objection to State's witnesses interpreting those same records without being qualified to do so.

Applicant did not pursue any allegations of ineffective assistance of appellate counsel, and this Court finds such allegations were waived.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the trial transcript in its entirety. Additionally, this Court listened to testimony during the PCR hearing, where it had the opportunity to observe the witnesses, pass upon their credibility, and weigh their testimony.² After consideration, this Court finds Applicant has proved allegations one and five of the Amended Application. This Court finds Applicant has failed to meet his burden of proof on the remaining allegations. Set forth below are the relevant findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In a PCR action, an applicant carries the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). To prove ineffective assistance of counsel, an applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("Surmounting Strickland's high bar is never an easy task.").

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney

² This Court will set forth testimony from the PCR hearing as relevant below.

performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Allegations Applicant has Proved:

This Court finds Applicant has met his burden of proof on allegations one and five of the Amended Application, as set forth below:

- 1. Trial counsel failed to adequately cross-examine the victims and their father regarding prior inconsistent statements and failed to call witnesses regarding prior inconsistent statements. Rule 613 SCRE, "Prior Statement of Witness."**

The failures, omissions, and absences of effective counsel during the Applicant's trial, as listed above, prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 625. That prejudice can be shown for the following reasons:

1. The failure to adequately cross-examine the alleged victims and their father, as well as a failure to call witnesses regarding those prior inconsistent statements prevents the Applicant from any chance to impeach the testimony of the victims and their father. If those witnesses had been properly impeached and their veracity questioned by the jury, it is reasonable to believe the result of the trial would have been different.

- 5. Trial counsel failed to object to the State's use of an Applicant's laptop bag during the direct examination of Investigator Joseph Clarke.**

Where an assistant solicitor's improper remarks are not objected to by trial counsel, and where trial counsel fails to request a curative instruction regarding the assistant solicitor's improper remarks, trial counsel's representation is found to be ineffective and that relief under a



PCR action should be granted. Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (S.C. 2019).

During Applicant's trial, an assistant solicitor was allowed to make improper remarks regarding the laptop bag that Applicant had with him during trial (R. 501) without an objection by trial counsel, nor was a curative instruction to the jury asked for.

By not objecting to the State's use of Applicant's laptop bag during the testimony of Inv. Clarke, the State could never have made the inference or argument that Applicant's laptop bag in court was the same laptop bag alleged to have been used in the crime. Had the State not been able to make that argument or inference to the jury, it is reasonable to believe the result of the trial would have been different. Failing to object also cost Applicant the ability to argue the issue on appeal.

Based on the foregoing, this Court finds Applicant has proved allegations one and five of the Amended Application.

Allegations Applicant has NOT Proved:

This Court finds Applicant has NOT proven the remaining allegations, as set forth below:

2. Failure to object to first-degree burglary indictment.

Applicant contends trial counsel was ineffective for not objecting to the first-degree burglary indictment. At the PCR hearing, Walker and Bank testified there was nothing structurally or facially wrong with the indictment. Although Walker disputed whether the home was a "dwelling" within the meaning of the first-degree burglary statute, she stated she raised that issue at the directed verdict stage—the appropriate time to do so. Bank recalled discussing whether the structure was a "dwelling" and agreed the appropriate time to raise that issue was at the directed verdict stage.

This Court finds Applicant has not proved this allegation. The indictment was facially



sufficient to put Applicant on notice of what he was being tried for, and counsel thus had no reason to object. See State v. Tumbleston, 376 S.C. 90, 95, 654 S.E.2d 849, 852 (Ct. App. 2007) ([A]n indictment is a ‘notice document.’); id. at 96–97, 654 S.E.2d at 852 (“[T]he circuit court should evaluate the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense intended to be charged.”); Thompson v. State, 357 S.C. 192, 195, 593 S.E.2d 139, 140 (2004) (“The language in the body of each indictment together with the reference to the statute in each title sufficiently alleges all the elements of criminal conspiracy.” (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005))). Here, the indictment alleged

Anthony M. Porterfield and/or another co-defendant did in Richland County on or about June 27, 2012, enter the dwelling of [Child 1] located at [address³], without consent and with the intent to commit a crime therein and when, in effecting entry or while in the dwelling or in immediate flight therefrom, the defendant displayed what was or appeared to be a firearm, in violation of Section 16-11-0311(A), Code of Laws of South Carolina, 1976, as amended.

Pertinently, the indictment gave Applicant sufficient facts to know what he was being tried for and cited the first-degree burglary statute. There was thus no basis to object, and counsel were not deficient for not challenging the indictment. See Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) (“One of the key circumstances a court must consider in its examination of counsel’s decision not to make a particular objection is whether there was any law to support the objection.”). Likewise, because the indictment was sufficient, Applicant has not shown prejudice from counsel’s failure to object.

³ This Court has redacted the address from this order to protect the privacy of the victims.

Further, the proper time to argue whether the home was a “dwelling” under the statute was at the directed verdict stage. Counsel properly raised this issue in the directed verdict motion and specifically argued the home-business was not a dwelling within the meaning of the burglary statute. (R. 546-48). Thus, Applicant has failed to prove deficiency or prejudice, and this allegation is **denied** and dismissed with prejudice.

3. Failure to object to the admission of jail phone calls.

Applicant avers counsel was ineffective for failing to object to the admission of calls he placed from the detention center based on lack of foundation.⁴ At the PCR hearing, Applicant also contended counsel was ineffective for not moving to suppress the calls under the Fourth Amendment. Applicant has failed to prove counsel was ineffective in these regards.

At the PCR hearing, Applicant recalled the detention center played a message at the beginning of each call indicating the call was being recorded. He also admitted it was his voice in the calls that were admitted at trial. Walker and Bank testified Applicant never disputed it was him in the calls. Walker did not recall any authentication issues. Bank testified he challenged the calls based on Rule 403, SCRE, and he speculated they should have moved to suppress the calls based on the Fourth Amendment. Although Bank recalled discussing authentication, he had never known anyone to argue Waters could not authenticate calls from the detention center.

Initially, Applicant did not enter these calls into evidence at the PCR hearing. Without these calls, this Court cannot assess the likelihood that the outcome of trial would have been different if the calls were not admitted. Cf. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“A PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in

⁴ These calls were admitted during the testimony of Robert Waters, an employee of the detention center.



order to establish prejudice from the witness' failure to testify at trial.”). Thus, Applicant has failed to prove prejudice.

Further, Applicant has not shown counsel was deficient for not challenging the calls based on lack of foundation/authentication. This Court finds credible Walker and Bank’s testimony that Applicant never disputed it was him in the calls. Likewise, this Court finds credible Bank’s testimony that he had never known anyone to challenge whether Waters—a detention center employee—could authenticate the calls; thus, the decision not to challenge the calls on authentication did not fall below prevailing professional norms. Bank articulated a valid strategy in challenging the calls through Rule 403, SCRE, instead of authentication, and he did in fact raise this argument at trial.⁵ (Tr. 23-43, 335). Because counsel articulated a valid strategy in challenging the calls through a different rule, counsel was not deficient.

Additionally, the calls were properly authenticated, and thus counsel were not deficient for not objecting based on foundation. See Winkler, 418 S.C. at 653, 795 S.E.2d at 692 (“One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection.”). At trial, Waters testified he had reviewed the calls and they were in fact calls from the detention center. (Tr. 334-35). This testimony was sufficient to meet the very low threshold of authentication. See Rule 901, SCRE (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”); Deep Keel, LLC v. Atl. Priv. Equity Grp., LLC, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015) (“[T]he burden to authenticate . . . is not high’ and

⁵ Bank also argued the defense was entitled to enter the remainder of the calls pursuant to Rule 106, SCRE, but it would be overly burdensome to enter more than twenty hours of recorded calls, so the Court should just exclude all of them.

requires only that the proponent ‘offer[] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.’” (alterations in original) (quoting United States v. Hassan, 742 F.3d 104, 133 (4th Cir.2014)); cf. State v. Thompson, 420 S.C. 386, 399, 803 S.E.2d 44, 50 (Ct. App. 2017) (disagreeing with argument that “State was required to present testimony of a witness identifying the caller’s voice” to authenticate recording of 911 call). Thus, Applicant has not proved counsel was deficient for not objecting. For the same reasons, it is not reasonably likely an objection based on authenticity would have changed the outcome, and thus Applicant has not shown prejudice.

Likewise, Applicant has not shown counsel was ineffective for not moving to suppress the calls under the Fourth Amendment. Counsel were not deficient because their failure to raise this argument did not fall below prevailing professional norms. Based on the frequency with which jail calls are introduced into evidence at criminal trials and the fact our appellate courts have not issued a published opinion addressing this whether the admission of jail calls violates the Fourth Amendment, the only logical inference is that this is not an argument routinely raised.⁶ Thus, counsels’ failure to raise it did not fall below prevailing professional norms.

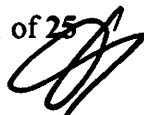
⁶ At the PCR hearing, Bank referenced State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976), as support for an argument that the calls should have been suppressed under the Fourth Amendment. However, Ellefson, which involved the seizure of a detainee’s letters rather than the recording of phone calls, is distinguishable because the letters in Ellefson “were obtained by the State through the efforts of a detective who was Not connected with the operation of the jail.” Id. at 498, 224 S.E.2d at 668. The Ellefson court acknowledged jail employees could read detainees’ letters to maintain security. See id. at 500, 224 S.E.2d at 669 (“If jail security justified surveillance of his mail, then the Jail officials could open the letters in order to achieve that legitimate government purpose.”). The Ellefson court also acknowledged the “host of decisions upholding introduction of evidence resulting from prison inspections” when “the search was either explicitly or implicitly conceived as being properly calculated to maintain prison or jail security.” Id. at 499, 224 S.E.2d at 669. The Ellefson court primarily took issue with the fact a detective—whose “efforts were entirely investigatory and in pursuit of securing a conviction”—was the person reviewing the mail, reasoning the search was not justified by jail security or any legitimate jail purpose. Id. at 498, 501, 224 S.E.2d at 668 669 (“The testimony of the detective

Additionally, Applicant has not shown prejudice. Applicant admitted he knew the calls were recorded. Thus, he had no reasonable expectation of privacy during these calls—making it not reasonably likely the calls would have been suppressed on Fourth Amendment grounds. See New York v. Class, 475 U.S. 106, 112 (1986) (“[T]he State’s intrusion into a particular area . . . cannot result in a Fourth Amendment violation unless the area is one in which there is a constitutionally protected reasonable expectation of privacy.”); United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996) (“Such a constitutionally protected reasonable expectation of privacy exists only if (1) the defendant has an actual subjective expectation of privacy in the place searched and (2) society is objectively prepared to recognize that expectation.” (internal quotation marks omitted)); id. at 290-291 (“[N]o prisoner should reasonably expect privacy in his outbound telephone calls.”); cf. Hudson v. Palmer, 468 U.S. 517, 526 (1984) (“[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell . . . ; accordingly, the Fourth Amendment proscription against unreasonable searches and seizures does not apply within the confines of a prison cell.”). Thus, this allegation is **denied** and dismissed with prejudice.

4. Providing the State with Diana Addison’s phone number.

Applicant contends trial counsel was ineffective for providing the State with his girlfriend Diana Addison’s phone number. At the PCR hearing, Addison testified she was present during

refutes the idea that the search was for any legitimate jail purpose.”). Applicant has not submitted evidence that anyone other than the detention center searched his calls. Further, due to more recent opinions, this Court finds counsel was not deficient for failing to object. See, e.g., State v. Matthews, 296 S.C. 379, 389-90, 373 S.E.2d 587, 593 (1988) (rejecting defendant’s claim that seizure of letters from prison cell violated Fourth Amendment; noting prisoners do not have an expectation of privacy in a prison cell and even if they did, such a “right would be subordinate to corrections officials’ legitimate interest in security”); State v. Martin, 2017-UP-246 (2017) (finding introduction of jail calls did not violate Fourth Amendment when prisoner had no reasonable expectation of privacy after being informed the calls were recorded).

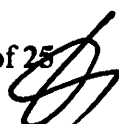


some of Applicant's meetings with trial counsel, and counsel mentioned she had given the State Addison's phone number. Applicant averred this information allowed the State to identify calls he placed at the detention center, some of which were later introduced at trial. However, Walker and Bank denied giving Addison's number to the State. Bank explained the detention center assigns each detainee a four-digit number to enter at the beginning of calls, and the State could have obtained the calls regardless of whether it had Addison's phone number.

Applicant has not shown counsel was ineffective in this regard. This Court finds Addison's testimony on this issue NOT credible. Conversely, this Court finds credible counsel's testimony that they did not give the State Addison's number. Thus, Applicant failed to prove deficiency. Applicant likewise failed to prove prejudice because he did not enter the calls into evidence—thus making this Court unable to determine whether a reasonable likelihood exists that the outcome of trial would have been different without these calls. Cf. Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (“A PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.”). Finally, based on Bank's testimony, the State would have discovered the calls using Applicant's four-digit number regardless of whether it had Addison's number. In other words, the State did not need Addison's number to locate the calls. Thus, this allegation is **denied** and dismissed with prejudice.

6. Failure to address Fourth Amendment Violations from Applicant's arrest.

Applicant alleges counsel was ineffective for not challenging his arrest based on Fourth Amendment grounds. At the PCR hearing, he acknowledged law enforcement obtained warrants for his arrest about a week before his arrest and located him at a friend's house using the Fugitive Swat Team. He averred, however, that police must have violated his Fourth Amendment rights



because he had his phone turned off, he walked to this home when he learned police were looking for him, and the Swat team surrounded the home about ten to fifteen minutes later. Basically, Applicant questioned how law enforcement located him at this home. During cross-examination, he admitted he was not arguing any evidence should have been suppressed; he was arguing he was somewhere with an expectation of privacy because no one knew he was at that home (other than the people who lived there).

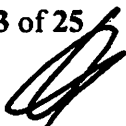
Applicant has failed to prove counsel was ineffective in this regard. Initially, Applicant has not identified a Fourth Amendment violation that occurred when he was arrested. Notably, law enforcement had a warrant for Applicant's arrest when they sent a fugitive team to apprehend him. Applicant has presented no evidence that his arrest was unlawful; he merely complains that he was arrested at a location where he anticipated law enforcement would not find him. Thus, he has not shown counsel was deficient for failing to challenge the arrest on Fourth Amendment grounds.

Further, Applicant has not identified any evidence he believes should have been suppressed and therefore has not shown prejudice.⁷ Applicant, Walker, and Bank each testified no evidence was seized from Applicant following his arrest. Therefore, there was no evidence to be suppressed, and no probability the outcome of Applicant's trial would have been different had counsel objected to the circumstances surrounding Applicant's arrest. Accordingly, this allegation is **denied** and dismissed with prejudice.

7. Failure to object to the State's burden-shifting arguments.

Applicant argues counsel was ineffective for not objecting when the State referenced his failure to call Tyrue Ruffin (TK) as a witness. At the PCR hearing, Applicant testified TK was

⁷ To the extent Applicant complains about the admission of evidence about his flight, such evidence is irrelevant to an analysis of whether his Fourth Amendment rights were violated.



an “associate” that he mentioned in jail calls; TK became relevant to the State because the other man who entered the home was never identified. Applicant averred the solicitor’s questions to witnesses asking where TK was constituted burden-shifting.⁸ He acknowledged counsel *did* raise this issue but averred they did not make a contemporaneous objection. Walker testified she *did* object. Bank recalled they spoke to TK but “he was not a true alibi witness.”

Applicant has failed to prove counsel was ineffective in this regard. Trial counsel did, in fact, object to the State’s questions about whether TK was in the courtroom and argued the State was shifting the burden of proof. (Tr. 676-77). The trial court disagreed, stating, “There is a recent case on the missing witness rule I agree the burden cannot be shifted.” (Tr. 677). Because this objection was raised, counsel was not deficient.

To the extent Applicant avers counsel were deficient for not making a contemporaneous objection to preserve this for appeal, Applicant did not prove counsel was deficient because the State’s questions were not improper under current South Carolina law. See State v. Charping, 333 S.C. 124, 128, 508 S.E.2d 851, 853 (1998) (“[I]t is always proper for an attorney in argument to the jury to point out the failure of a party to call a witness.”); State v. Shackelford, 228 S.C. 9, 11, 88 S.E.2d 778, 779 (1955) (“Where the evidence indicates that there are witnesses, seemingly accessible to the accused, or under his control, who are or should be cognizant of material and relevant facts and competent to testify thereto, and whose testimony would presumably aid him or substantiate his story if it were true, it is not improper for the prosecuting attorney to comment upon his failure to produce them.”); In re Gonzalez, 409 S.C. 621, 635, 763 S.E.2d 210, 217 (2014) (recognizing applicability of missing witness rule to fact witness that is “under the control of the party failing to call him” and defining control “to mean

⁸ This was the issue raised in the Anders brief.

the uncalled witness is an agent, employee, relation, or *associate* of the party failing to call him” (emphasis added)).⁹ For the same reason, it is not reasonably likely the outcome would have been different had Applicant objected; thus, Applicant has not shown prejudice.

Finally, Applicant did not prove counsel was ineffective for not objecting to the State’s closing argument. The State’s lengthy closing argument referenced the multiple, conflicting alibi stories presented by Applicant. (Tr. 957-58, 966-68). In its twenty-page argument, the State made only a brief passing reference (“TK—who still hasn’t made it”) to TK not being at trial. (Tr. 966-67). This Court finds counsel was not deficient for not objecting to this brief, passing reference. Additionally, because this was a brief, passing reference in a lengthy closing argument, it is not reasonably likely the outcome of trial would have been different had counsel objected. See also Gonzalez, 409 S.C. at 636, 763 S.E.2d at 218 (finding improper adverse inference argument during closing argument harmless when the issue was “before the jury during cross-examination[and] any adverse inference arguably arose at that time, so the explicit suggestion of an adverse inference by the State in its closing argument was merely cumulative”). Thus, this allegation is **denied** and dismissed with prejudice.

8. Failure to object to Applicant wearing leg shackles during trial.

Applicant next argues trial counsel was deficient for failing to object to Applicant being in leg shackles during trial. At the PCR hearing, Applicant testified counsel told him to keep his feet under the table and motioned for him to put his hand down when he lifted it. He stated he

⁹ As noted in Applicant’s brief to the Court of Appeals, “Although the law is clear that South Carolina does not permit an adverse inference comment when the defendant presents *no* evidence, *the law is less clear concerning an absolute bar to such a comment when the defendant presents evidence*, particularly[] evidence of an alibi.” (Anders Br. 17, emphasis added). This shows that at the time of Applicant’s trial, South Carolina law did not prohibit an adverse inference comment when a defendant presented evidence. Thus, counsel were not deficient for not objecting. Cf. Winkler, 418 S.C. at 653, 795 S.E.2d at 692 (“An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.”).



was oblivious to the fact that shackles were not supposed to be seen. Walker recalled asking the court to remove Applicant's shackles before he testified. Bank recalled the jury was not present when Applicant went to the witness stand. He agreed the jury would not have seen Applicant's legs during trial due to the way the tables are set up in the Richland County Courthouse.

Applicant has failed to prove counsel was ineffective in this regard. Initially, counsel *did* raise this issue to the court by asking to remove Applicant's shackles prior to his testimony and thus they were not deficient. (Tr. 683). To the extent Applicant avers counsel was deficient for not making this request at the start of trial, this Court notes the trial court denied the request to remove the shackles when counsel raised this issue. (Tr. 683). Based on that decision—which was within the trial court's discretion—it is not reasonably likely the outcome would have been different had counsel raised this issue at the start of trial. Additionally, Applicant has presented no evidence other than speculation that any juror saw him shackled. See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (“Petitioner did not offer the testimony or affidavits of any of the seated jurors that they saw petitioner in chains and petitioner was prejudiced thereby. Without this evidence, petitioner's claim is not supported by any probative evidence and is based on pure speculation.”). Accordingly, Applicant failed to prove prejudice. Thus, this allegation is **denied** and dismissed with prejudice.

9. Failure to object to accomplice liability charge.

Applicant contends counsel was ineffective for not objecting to the accomplice liability charge because evidence did not support it.¹⁰ At the PCR hearing, Applicant testified the State never identified an accomplice other than to speculate it was TK, and thus there was no evidence of a co-defendant. However, he agreed Child 1 and Child 2 always alleged two men were

¹⁰ The accomplice liability charge is on pages 989-92 of the trial transcript.



present. Applicant maintained he was not present during the home invasion.

Applicant has not shown counsel was ineffective in this regard. First, counsel was not deficient for not objecting to the accomplice liability charge because evidence supported the charge. See State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020) (“For an accomplice liability instruction to be warranted, the evidence must be ‘equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.’” (quoting Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011))). Here, there was conflicting evidence as to whether Applicant or the unidentified man was the armed assailant. At trial, both children testified two men committed the robbery. Although Child 1 stated she saw Applicant with the gun during direct examination, on cross-examination she stated the unidentified assailant had the gun. (R. 196, 210-11). Whether Applicant or the unidentified assailant was armed could have been significant to the jury—especially regarding the armed robbery offense. Because the evidence was equivocal on an integral fact, the accomplice liability instruction was supported by the evidence, and trial counsel was not deficient in not objecting. Likewise, because evidence supported the charge, Applicant was not prejudiced by counsel’s failure to object. Thus, this allegation is **denied** and dismissed with prejudice.

10. Failure to review discovery with Applicant prior to trial.

At the PCR hearing, Applicant testified counsel was ineffective for not reviewing all the discovery with him prior to trial. He admitted to seeing the arrest warrants, cell phone records, and TK’s statement, but he asserted he did not see statements from alibi witnesses. Applicant believed it would have been more effective to have TK testify than Nazirah Gale (“Nana”). However, he acknowledged he was told TK wasn’t helpful and would testify that he (TK) was at



the zoo when the home invasion occurred. In contrast, Walker testified it was her common practice to review discovery with clients, and she reviewed discovery with Applicant five to six times prior to trial. Bank stated he met with Applicant three to four times, and Walker would have met with Applicant more. He agreed Applicant had plenty of access to discovery.

Applicant has not shown counsel was ineffective in this regard. Initially, this Court finds counsel's testimony on this issue credible and Applicant's testimony on this issue not credible. Because counsel met with Applicant multiple times before trial and reviewed discovery, counsel was not deficient. Further, Applicant has failed to prove prejudice because he has not identified any evidence they failed to review or how it would have changed the outcome of trial. Pertinently, Applicant has not introduced into evidence the purported alibi witness statements or any testimony from TK. Without such evidence, this Court would be speculating about whether Applicant suffered prejudice from counsel's failure to review such evidence with him. See Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (“[T]o support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.”). Accordingly, this allegation is **denied** and dismissed with prejudice.

11. Failure to prepare Applicant for his testimony.

Applicant asserts counsel was ineffective for not preparing him to testify. At the PCR hearing, Applicant recalled discussing whether he would testify and explained he didn't want to testify, but things took a complete turn prior to trial and he was led to believe he could put everything in perspective if he testified. He averred his testimony was necessary to contradict



the State's "spin" about his jail calls. Applicant stated counsel did not prepare him; counsel simply told him to "go tell [his] story."

Walker recalled discussing with Applicant whether he should testify and reviewing with him his impeachable offenses. Bank recalled discussing with Applicant pretrial the possibility that he would testify, although he did not recall when the decision was made. He explained they may have finalized the decision on the day of trial but would have discussed it.

Applicant has failed to show counsel was ineffective in this regard. This Court finds credible counsel's testimony that they prepared Applicant before trial for the possibility of testifying. Although the decision may have been made on the day of his testimony, Walker and Bank testified they prepared Applicant for that possibility in advance. Because counsel met with Applicant five to six times prior to trial and discussed his potential testimony, counsel was not deficient in this regard. Likewise, Applicant has failed to explain what more counsel should have done to prepare him and thus has not shown how the outcome would have been different with more preparation. Thus, Applicant failed to prove prejudice, and this allegation is **denied** and dismissed with prejudice.

12. Failure to elicit evidence about Applicant's relationship with Gulzar Nathani.

At the PCR hearing, Applicant testified he sold Nathani electronics that Applicant had stolen from his employer. Applicant stated he earned over \$50,000 from this arrangement. He explained he wanted to testify about this at trial but counsel advised him not to. However, he admitted Walker "made some good points" when advising him not to testify about his prior felonious relationship with Nathani.¹¹ Applicant averred the jury would question his motive to

¹¹ Applicant *did* testify at trial that he sold old electronics to Nathani. (Tr. 701-04). Additionally, he testified, "I knew the business that I had with Mr. Nathani. And I knew that, you know—I knew everything wasn't legitimate." (Tr. 706).

rob Nathani if they knew about his past conduct with Nathani. He acknowledged Bank tried to discuss Nathani's "true" business but the judge cut him off.

Applicant has not shown show counsel was ineffective in this regard. It defies common sense to suggest it would be beneficial for a defendant who is on trial for stealing electronics to admit he previously sold stolen electronics. Had Applicant offered this testimony, the jury may have concluded Applicant must have robbed Nathani merely because Applicant stole electronics in the past. Such a conclusion is the forbidden propensity inference that our Supreme Court has repeatedly sought to prevent when analyzing the admission of prior bad acts under Rule 404(b) SCRE. See generally State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). Despite trial counsel's willingness to speculate in hindsight at the PCR hearing that such a strategy may have made a difference—which this Court does not find credible—this Court finds advising Applicant to admit he had previously stolen electronics would not have been reasonable under prevailing professional norms, especially in an armed robbery trial. In fact, this Court finds counsel would have been deficient if they had advised Applicant to admit he previously sold stolen goods.

Further, Applicant did not show a reasonable likelihood the outcome would have been different had he testified he sold stolen goods to Nathani. This Court finds such testimony would have made it even more likely the jury would convict him. Applicant has failed to meet either prong of Strickland; thus, this allegation is **denied** and dismissed with prejudice.

13. Failure to properly investigate.

At the PCR hearing, Applicant testified Nathani had said Applicant called him multiple times, but phone records did not support that statement. Applicant contended counsel should have further investigated the cell site locations for cell phone calls. Additionally, he asserted there were several businesses around Nathani's home, and counsel should have obtained



surveillance footage to prove he wasn't near the scene of the robbery.

Walker and Bank testified they hired Detective B.G. Watkins to investigate. Although Detective Watkins passed away before trial, counsel used information that Detective Watkins gathered to prepare for trial. Walker testified Luke Shealy, Applicant's counsel prior to Walker and Bank, had subpoenaed cell phone records showing GPS coordinates, but triangulation did not come up trial. She explained triangulation was less accurate at the time of this offense than it is today. Walker did not recall discussing video surveillance from surrounding businesses.

Applicant has failed to prove counsel was ineffective in this regard. Initially, counsel's investigation was more than adequate. Counsel hired an investigator and used the evidence he gathered to call five alibi witnesses at trial. Overall, counsel's investigation did not fall below prevailing professional norms, and Applicant has not proved deficiency. Additionally, Applicant did not enter into evidence any information he believed counsel would have obtained upon further investigation. Specifically, he did not enter any video footage or evidence regarding cell site locations. Thus, he has not proved prejudice. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Accordingly, this allegation is **denied** and dismissed with prejudice.

14. Failure to object to the admission of Applicant's and Nathani's cell phone records.

Applicant next alleges trial counsel was ineffective for failing to object to the admission of cell phone records through Captain Scott McDonald. At trial, the State used Nathani's and Applicant's phone records to show they exchanged many phone calls prior to the robbery but stopped calling each other after the robbery. During the PCR hearing, Applicant averred counsel was ineffective for not objecting to the admission of the records through Captain McDonald.



Applicant has not shown counsel was ineffective in this regard. This Court finds Captain McDonald was a proper witness to authenticate the phone records because his job involved obtaining and interpreting phone records. (R. 433). Thus, counsel was not deficient. See Deep Keel, 413 S.C. at 64–65, 773 S.E.2d at 610 (“[T]he burden to authenticate . . . is not high’ and requires only that the proponent ‘offer[] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.’” (alterations in original) (quoting Hassan, 742 F.3d at 133)). Further, Applicant did not prove prejudice because he did not enter the records at the PCR hearing, making this court unable to discern how the records prejudiced him. Additionally, the records were cumulative to records previously admitted by Applicant.¹² (App. 270-71). Finally, the value of the phone records—to show that phone calls between Applicant and Nathani ceased after the robbery—was minimal to the State’s case, and this Court finds it is not reasonably likely the outcome would have been different without the records. Thus, this allegation is **denied** and dismissed with prejudice.

15. Failure to prepare Applicant’s witnesses.

Applicant next claims trial counsel was ineffective for failing to prepare Applicant’s witnesses. At the PCR hearing, he testified Nana’s testimony that she picked him up from work that day contradicted his testimony that TK picked him up.¹³ Applicant also asserted some of his witnesses needed to have their memory refreshed with their statements. Meanwhile, trial counsel

¹² Applicant had previously admitted a portion of Nathani’s phone records during his cross-examination of Nathani. (R. 270-71). Because Nathani’s records had already been admitted (through Applicant), the State could have made the same point regarding the frequency of phone calls before and after the robbery without Applicant’s phone records.

¹³ Although Nana testified prior to Applicant, Applicant testified he recalled TK—not Nana—picking him up from work at the beginning of his lunch break that day. (Tr. 692). Notwithstanding this inconsistency, Applicant and Nana both testified they were at Applicant’s apartment during Applicant’s lunch break while TK was moving out, and Nana drove Applicant back to work. (Tr. 580-83, 695-99).



testified they prepared each witness for their testimony as much as possible due to some of the witnesses' refusal to cooperate and the geographic location of others.

Applicant has not proved counsel were ineffective in this regard. Initially, this Court finds credible counsels' testimony that they prepared each witness as much as possible due to some of the witness' refusal to cooperate and the geographic location of others. Thus, counsel was not deficient. Further, Applicant has not proved prejudice. Pertinently, Applicant primarily complains that his testimony differed from Nana's testimony. However, given a witness's requirement to testify truthfully, it is unclear what he wanted counsel to do to better "prepare" this witness. In other words, it would have been unethical for counsel to "prepare" Nana by telling her what her testimony should be. Further, the inconsistency about who picked Applicant up from work for his lunch break was immaterial to the alibi defense. To establish the alibi, Applicant needed to show what time he *returned* to work. Both Nana and Applicant testified she drove him back to work after being at his apartment while TK was moving out. Thus, the material portion of their testimony was consistent, and Applicant has not shown prejudice. Therefore, this allegation is **denied** and dismissed with prejudice.

16. Failure to call an expert to explain cell phone tower logs

Applicant's final allegation is that trial counsel was ineffective for not calling an expert witness to explain Applicant's cell phone tower logs. Bank testified using cell phone tower logs to determine a person's position was an inexact science in 2015. Additionally, Bank and Walker testified that Applicant's cell phone records revealed he was in the general area of the crime when it was committed. Therefore, cell phone tower testimony would not have aided Applicant because it would not have shown he was elsewhere at the time of the robbery.



Applicant has not proved counsel was ineffective in this regard. Initially, this Court finds credible counsel's testimony that the records showed Applicant was in the general area of the crime when it was committed—making their decision to not further pursue his cell phone location objectively reasonable. Further, counsel engaged in a reasonable strategy to establish Applicant's whereabouts at the time of the robbery through alibi witnesses. Thus, Applicant has not shown counsel was deficient for not calling a cell phone tower expert. Finally—and importantly—Applicant did not present the testimony of an expert at the PCR hearing and thus did not establish prejudice. Cf. Glover, 318 S.C. at 498–99, 458 S.E.2d at 540 (“In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.”). Accordingly, this allegation is **denied** and dismissed with prejudice.

CONCLUSION

Based on the foregoing, this Court finds Applicant has met both prongs of the Strickland test for ineffective assistance of counsel as to allegations one and five of the Amended Application. This Court finds and concludes Applicant has failed to meet his burden of proof as to the remaining allegations in the Amended Application. Thus, Applicant's convictions are **vacated** and a **new trial** is ordered.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an

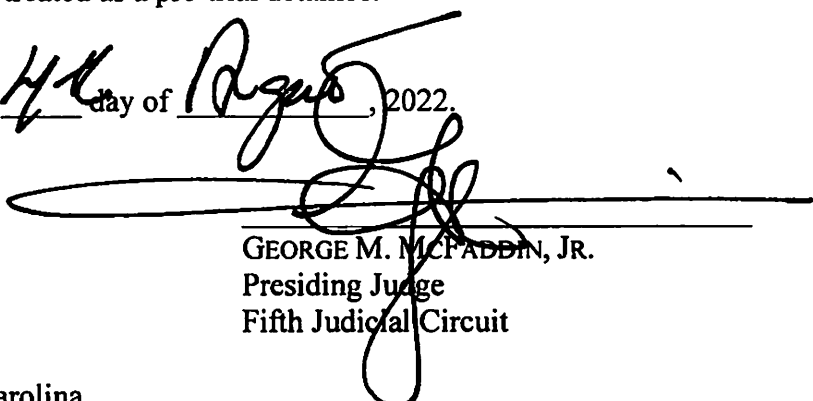


Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Pursuant to Rule 71.1(g), SCRPC, if Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.


IT IS THEREFORE ORDERED:

1. This application for PCR is GRANTED as to two claims presented by Applicant and denied as to all others;
2. Applicant shall be remanded to the Richland County Detention Center pending retrial or other disposition of the underlying charges referenced in this order; and
3. Applicant shall be treated as a pre-trial detainee.

AND IT IS SO ORDERED this 4th day of August, 2022.



GEORGE M. MCFADDIN, JR.
Presiding Judge
Fifth Judicial Circuit

, South Carolina